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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–793

HOUSING AUTHORITY OF THE CITY OF OMAHA, NEBRASKA, ET AL., PETITIONERS

v.

UNITED STATES HOUSING AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 468 F. 2d 1 (Pet. App. 22–39). The opinion of the district court is reported at 54 F.R.D. 402 (Pet. App. 1–10).

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1972 (Pet. App. 22–39). A timely petition for rehearing en banc was denied on October 26, 1972 (Pet. App. 40–56, 57). The petition for a writ of certiorari was filed on November 29, 1972. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of Housing and Urban Development ("HUD") has statutory authority to require, by regulation, certain minimum tenant lease provisions and grievance procedures in the low-rent housing program established by the United States Housing Act of 1937, as amended, 42 U.S.C. 1401, *et seq.*

2. Whether the regulations promulgated by HUD in the low-rent housing program are exempt from the formal rule-making requirements of Section 4 of the Administrative Procedure Act, now 5 U.S.C. 553.

3. Whether the HUD regulations impair contractual obligations in contravention of the Fifth Amendment.

STATUTES INVOLVED

42 U.S.C. 1408 provides:

> [HUD] may from time to time make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this chapter.

42 U.S.C. 1401 provides in pertinent part:

> * * * It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of [HUD]), with due consideration to accomplishing the objectives of this chapter while effecting economies. * * *

COPY BOUND TO

5 U.S.C. 553 provides in pertinent part:

> (a) This section applies, according to the provisions thereof, except to the extent that there is involved—
>
> * * * * *
>
> (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts.
>
> * * * * *

STATEMENT

Under the United States Housing Act of 1937, as amended, 42 U.S.C. 1401 *et seq.*, federal funds are provided through the Secretary of Housing and Urban Development ("HUD") to local public housing agencies who are authorized to develop or administer low-rent housing projects or slum clearance. 42 U.S.C. 1401, 1402. By means of a contract—the Annual Contributions Contract (ACC)—between the United States and the local housing authorities, the United States makes annual contributions of a fixed amount for a fixed period of years to assist in achieving and maintaining the low-rent character of the local housing projects. 42 U.S.C. 1410.

Pursuant to Section 8 of the Act, 42 U.S.C. 1408, which authorizes such regulations as may be necessary to carry out the provisions of the Act, HUD issued the regulations here involved: circulars RHM 7465.8 and RHM 7465.9 (hereafter circular 8 and circular 9).[1] Circular 8 requires that tenant leases used by the local housing authorities contain certain

[1] HUD regulations are contained in a permanent manual. Changes in the manual are initially promulgated as circulars, which are later physically incorporated into the manual. See *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 275.

minimum rights and obligations of the parties, including provisions that rental payments are to be accepted without regard to other charges assessed against a tenant; that the tenant is to take reasonable care of the premises and to pay for damage intentionally or negligently caused; that if defects which are hazardous to life, health and safety are reported to management and not corrected within 72 hours, or alternate accommodations provided, there will be an abatement of rent until repairs are made; that inspection of the premises may be made only upon written notice during reasonable hours unless an emergency exists; that management can terminate the lease only for good cause; and that all grievances are to be processed according to the management grievance procedure (A. 91).[2]

Circular 9 outlines the minimum requirements for the grievance procedure, under which the tenant is entitled to a hearing before either an impartial officer or panel on any dispute concerning the lease, or any housing authority regulations, policy or procedures that adversely affect him. He is also entitled to reasonable notice of the grounds for the housing authority's disposition of the initial complaint, and the right to counsel and to present and cross-examine witnesses. Circular 9 also requires a written decision specifying the reasons for the ruling and provides that a decision adverse to the housing authority is binding unless arbitrary or capricious, but both sides may obtain judicial relief from a decision adverse to the tenant (A. 103).

[2] "A" refers to the appendix in the court of appeals.

HUD issued these circulars after more than a year's discussion and negotiation between tenant representatives and housing authorities. In December 1969, HUD, in recognition of the detrimental effect that a deteriorating landlord-tenant relationship would have on the national housing policy, convened a Conference on Tenant's Rights and Responsibilities (A. 47–49). At that meeting, an "ad hoc" task force, chaired by HUD, and consisting of representatives of the National Association of Housing and Redevelopment Officials (NAHRO)[3] and the National Tenants Organization (NTO) was established to develop a model lease and grievance procedure (A. 49). In November 1970, NAHRO and NTO agreed on both a model lease and a model grievance procedure (A. 52). After further departmental consideration, HUD, on February 22, 1971, issued circulars 8 and 9 (A. 53).

Subsequently, on May 7, 1971, in order to obtain compliance with the circulars, HUD issued RHM 7465.1, Supp. 2, which directs local HUD officials to encourage implementation of circulars 8 and 9 within a reasonable time (Pet. App. 19). Upon failure of a housing authority to implement the circulars, the area directors are to recommend what action should be taken "such as withholding funds (*other than guaranteed subsidies*), referral * * * to the Department

[3] Although NAHRO is not the legal agent of their membership, it serves as the national representative for member housing authorities throughout the country. As of June 30, 1971, there were 2,195 public housing authorities; 1,045 of them, with 75 percent of the housing units, were members of NAHRO (A. 49).

of Justice for action to enforce compliance, or such other action as may be authorized and deemed appropriate" (Pet. App. 20) (emphasis added). No enforcement action can be taken without the approval of the Washington Central Office and no recommendation for withholding funds has been made to that office (A. 55).

The petitioners challenged the circulars in a suit brought as a class action on the grounds that the rule-making requirements of the Administrative Procedure Act were not followed; that the circulars violate the provision of the United States Housing Act of 1937, as amended, 42 U.S.C. 1401 *et seq.*, which declares it to be "the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program";[4] and that an alleged conflict between the circulars and the Annual Contributions Contract, and the threatened withholding of funds constitute a deprivation of property without due process of law (A. 1–9).[5]

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[4] The Housing Act of 1959, 73 Stat. 679, amended Section 1 of the United States Housing Act of 1937 by adding the "local autonomy amendment," which provides:

> It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of [HUD]), with due consideration to accomplishing the objectives of this chapter while effecting economies.

[5] HUD answered and counterclaimed for a declaration that the circulars were valid and for an order directing plaintiffs

The district court granted summary judgment for the plaintiffs, holding that the circulars violated the policy of vesting maximum responsibility in local housing authorities as expressed in 42 U.S.C. 1401 (Pet. App. 6–10). Although believing that the circulars were not exempt from the rule-making requirements of the Administrative Procedure Act, the court found that there was a factual issue whether the plaintiffs had actual notice of the circulars and that this precluded resolution of the question whether HUD had violated the APA in promulgating the circulars (Pet. App. 4, 5). The district court also found a question of fact present on the issue whether the circulars improperly conflict with the ACC (Pet. App. 4).

The court of appeals reversed, holding that both the statute and its legislative history make clear that the policy expressed in 42 U.S.C. 1401 does not preclude HUD from exercising "the ultimate supervision and authority in carrying out the objectives of the Housing Act" (Pet. App. 30). The court further held that since the circulars directly supplement the Annual Contributions Contract, they were exempted by 5 U.S.C. 553(a)(2) from the rule-making provisions of the APA (Pet. App. 36). With respect to the contention that the circulars violated the Fifth Amendment, the court found that the threatened withholding of funds presented only a hypothetical question, unnecessary for the court to decide, and that

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to comply with the circulars. Subsequently, NTO, local tenant organizations and tenants were permitted to intervene (A. 15-20).

there was "little merit" in the objection that the circulars improperly altered the ACC (Pet. App. 37).

ARGUMENT

The ruling of the court of appeals is correct, and in accord with every other decision on point. Further review is therefore unwarranted.

1. Petitioners contend that HUD's circulars improperly impinge upon the general policy of the Act to vest maximum authority in local housing authorities. But Section 1401 vests authority in the housing authorities only with respect to the "administration"[6] of the program and even in that area the delegation of authority is qualified.[7] In this regard the court of appeals stated (Pet. App. 31):

> In interpreting Section 1401, we find it significant that (1) there was not a complete transfer of authority to the local housing authorities, (2) although "administration" is not confined to

[6] "Administration" is defined as the "undertakings necessary for management, operation, maintenance, or financing, in connection with a low-rent housing * * * project * * *" and the "financing of tenant programs and services for families residing in low-rent housing projects * * *." 42 U.S.C. 1402.

[7] Section 1401 vests responsibility for the establishment of rents and eligibility requirements, *subject to the approval of HUD*. This is significant because the delegation of responsibility for the establishment of rents and eligibility requirements was a primary objective of the amendment to Section 1401 and even in those matters, the responsibility of the housing authorities is limited. See H. Rep. No. 566, 86th Cong., 1st Sess., p. 48 (1959). Further, the responsibility is vested in the housing authorities "*with due consideration to accomplishing the objectives of this chapter while effecting economies*" (emphasis added).

> budgetary acts and may necessarily be related to policy decisions, the ultimate responsibility for policy lies with the National Authority to achieve uniformity in fulfilling the objectives of the Act, and (3) where HUD determines that local authorities have failed to act or have acted in an inimical way to the objectives of the Act, that the ultimate authority is vested in HUD to set overall policy.

The court below therefore correctly determined that Section 1401 does not restrict HUD's "responsibility and concomitant authority to protect and further the purposes and objectives of the Act as expressly evidenced by Section 1408" (Pet. App. 33).

2. There is no conflict between the decision below and this Court's decision in *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268. On the question of HUD's statutory authority to issue the circulars, the court of appeals, following *Thorpe*, considered whether the circulars "have a 'reasonable relationship to the purposes for which HUD's rule-making power was authorized.'" (Pet. App. 27). In *Thorpe*, this Court noted that one of the purposes of the federal housing acts is to provide a " 'decent home and a suitable living environment for every American family' " (393 U.S. at 281). The court of appeals here determined that the relationship of the circulars to the purposes of the housing acts was "self-evident" in view of the statement by HUD that the circulars were intended to eliminate landlord-tenant hostility and antagonism

and thereby improve the quality of the living environment (Pet. App. 27).[8]

Moreover, with the exception of the district court in this case, other courts have consistently upheld circular 9 against the contention that Section 1401 precludes HUD's promulgation of the circular.[9] *Brown* v. *Housing Authority of the City of Milwaukee*, C.A. 7, No. 72–1259, decided December 8, 1972; *Lowery* v. *Housing Authority of the City of West Palm Beach, Florida, Inc.*, S.D. Fla., No. 71–1956—Civ. CF, decided September 11, 1972; *Chicago Housing Authority* v. *Harris*, 49 Ill. 2d 274, 275 N.E. 2d 353.

3. The rule-making requirements of Section 4 of the Administrative Procedure Act, now 5 U.S.C. 553, do not apply when there is involved "a matter relating to * * * contracts." 5 U.S.C. 553(a)(2). Since here, as in *Thorpe* (393 U.S. at 279), the circulars supplement the Annual Contributions Contract, they are

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[8] *Thorpe* did not, as petitioners contend (Br. 13–14), deal with limitations upon the extent of HUD's authority to issue regulations. *Thorpe* involved an eviction notification procedure, and this Court rejected as "untenable" the contention that such a circular violated the congressional policy to vest maximum responsibility in local housing authorities (393 U.S. at 278). The Court did cite a portion of the housing authority's brief to establish the "minimal effect upon the Authority's 'responsibility in the administration'" of a housing project (393 U.S. at 277–278), but this was certainly not intended to limit HUD's authority to issue appropriate regulations.

[9] Circular 9 has also been consistently applied by lower courts. *Glover* v. *Housing Authority of the City of Bessemer, Ala.*, 444 F. 2d 158 (C.A. 5); *Lewis* v. *Housing Authority of the City of Talladega, Ala.*, N.D. Ala., No. 67–106, decided May 26, 1972; *Housing Authority of the City of Milwaukee* v. *Mosby*, 53 Wis. 2d 275, 192 N.W. 2d 913.

excepted from Section 4 of the Administrative Procedure Act. *Brown* v. *Housing Authority of the City of Milwaukee, supra; Chicago Housing Authority* v. *Harris, supra; Hahn* v. *Gottlieb,* 430 F. 2d 1243 (C.A. 1); *Langevin* v. *Chenango Court, Inc.,* 447 F. 2d 296 (C.A. 2).[10]

Moreover, this issue is not of recurring importance because on March 4, 1971, HUD voluntarily adopted a policy of following the rule-making requirements of Section 4 of the APA. 36 F.R. 4291.

5. Petitioners' complaint alleged that the circulars conflict with paragraph 203B of the Annual Contributions Contract and thereby constitute an impairment of contract in violation of the Fifth Amendment (A. 8).[11] Circular 8 was expressly intended to implement paragraph 203(B) and contains nothing inconsistent with that provision (A. 92). Although circular 8 contains requirements in addition to those specified in 203(B), there is no prohibition in that

[10] The decision below does not conflict with *National Labor Relations Board* v. *Wyman-Gordon Co.,* 394 U.S. 759. That case concerned the use of adjudicatory procedures in lieu of the rule-making requirements and did not involve the Section 4 (a)(2) exception.

[11] Because of modifications of the ACC there are different versions of paragraph 203(B). One version requires that a written lease be executed by a responsible member of the family and that the lease contain all provisions necessary to meet the requirements of the Act and the Contract. The other version requires in addition to the foregoing that the lease shall not be terminated by the local authority except for violation of the lease or other good cause and that in terminating a tenancy the local authority shall inform the tenant in a private conference of the reasons for termination and provide an opportunity to reply (A. 7, 8, 92).

paragraph precluding such additional requirements. Accordingly, here as in *Thorpe*, "[t]he respective obligations of both HUD and the Authority under the annual contributions contract remain unchanged" (393 U.S. at 279).[12]

Moreover, there can be no doubt of HUD's authority to issue at least some regulations imposing burdens upon local housing authorities in the operation of this program. A public institution such as a local housing authority necessarily makes its contracts, under which it receives Federal funding, subject to that regulatory authority. And the exercise of that authority is not an "impairment" of the contract within the meaning of the Fifth Amendment.

The court of appeals properly rejected as hypothetical the contention that the threat to withhold funds if the circulars were not implemented violated the Fifth Amendment (Pet. App. 37). No recommendation for withholding funds has ever been made and since that approach was merely suggested as one possible alternative, there is no substantial likelihood that funds ever will be withheld. In any event, any issues arising from the withholding of funds relate only to the validity of that action and not to the validity of the circulars.

6. There is nothing to petitioners' final contention that the "Court of Appeals passed over in silence additional serious objections to the actions of HUD"

[12] There are no allegations in the complaint in this case which raise the question whether the circulars impair the contractural obligations in the leases between the tenants and the housing authorities (A. 1-9).

(Pet. 21). In the court of appeals petitioners did not make any due process argument with respect to either the promulgation of the circulars or the delegation of authority to the hearing panels. The court said nothing about these issues because petitioners failed to raise them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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